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19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**
21 **OAKLAND DIVISION**

Katten
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1 JEFF YOUNG, individually and on
2 behalf of all others similarly situated,

3 Plaintiff,

4 v.

5 CREE, Inc.,

6 Defendant.

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10 Case No. 4:17-cv-06252-YGR

11 Hon. Yvonne Gonzalez Rogers

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13
**[PROPOSED] PROTECTIVE
14 ORDER**

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1 Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, good cause
2 having been shown, the following Protective Order (the “Order”) is hereby entered
3 to facilitate and expedite discovery in this action.

4 Disclosure and discovery activity in this action are likely to involve
5 production of confidential, proprietary, or private information for which special
6 protection from public disclosure may be warranted. The parties acknowledge that
7 this Order does not confer blanket protections on all disclosures or responses to
8 discovery and that the protection it affords from public disclosure and use extends
9 only to the limited information or items that are entitled to confidential treatment
10 under the applicable legal principles. The parties further acknowledge that Civil
11 Local Rule 79-5 sets forth the procedures that must be followed and the standards
12 that will be applied when a party seeks permission from the court to file material
13 under seal.

14 IT IS HEREBY ORDERED that Plaintiff, Defendant, and any person
15 subject to this Order shall adhere to the following terms:

16 1. **Definition of Protected Material.** “Protected Material” means all
17 documents, tangible items, testimony, written discovery responses, and
18 information that have been properly designated by any party or non-party as
19 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” pursuant to this Order.
20 Such information produced by non-parties in connection with this litigation is also
21 protected by the remedies and relief provided by this Order. Nothing in these
22 provisions should be construed as prohibiting a non-party from seeking additional
23 protections.

24 2. **Criteria for Designation.** A party or non-party may designate
25 material as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” only in
26 accordance with the following procedures:

27 (a) **“CONFIDENTIAL” Material.** A party or non-party (the
28 “Designating Party”) may designate documents, tangible items, testimony, or other

1 information (collectively, “material”) as “CONFIDENTIAL” if the party or non-
2 party reasonably believes that the material contains a trade secret or other
3 proprietary or confidential business, technical, sales, marketing, financial or other
4 commercial information.

3. Manner of Designation.

Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Protective Order.

Mass, indiscriminate, or routinized designations are prohibited. Designations
that are shown to be clearly unjustified or that have been made for an improper
purpose (e.g., to unnecessarily encumber or retard the case development process or
to impose unnecessary expenses and burdens on other parties) expose the
Designating Party to court remedies.

If it comes to a Designating Party's attention that information or items that it designated for protection do not qualify for protection at all or do not qualify for the level of protection initially asserted, that Designating Party must promptly notify all other parties that it is withdrawing the mistaken designation.

The Designating Party shall designate Protected Material in the following manner:

(a) For information in documentary form (e.g., paper or electronic documents, but excluding transcripts of depositions or other pretrial or trial proceedings), by placing the notation "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" on each page of such document. If only a portion or portions of the material on a page qualifies for protection, the Designating Party also must clearly identify the protected portion(s) (e.g., by making appropriate markings) and must specify, for each portion, the level of protection being asserted;

(b) For information produced in some form other than documentary and for any other tangible items, by placing the notation "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" on the item, or if such is not practicable, as otherwise agreed by the parties. If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.;

(c) For testimony given in deposition or in other pretrial or trial proceedings, by (i) designating such testimony as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" within the time periods allowed pursuant to paragraph 4(c) of this Order; and (ii) requesting that the court reporter place the notation "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" on each page of the transcript so designated, which designated pages of the transcript shall be separately bound and conspicuously marked on its cover; any testimony taken by the parties during which Protected Material is being disclosed shall be taken as if in camera without any persons in attendance other than the persons listed in

1 Paragraph 6 below, except that the parties may by unanimous consent agree that
2 additional persons may attend; and

3 (d) For declarations, affidavits, written discovery responses, court filings
4 or pleadings, by placing the notation “CONFIDENTIAL” or “ATTORNEYS’
5 EYES ONLY” on the face of such document.

6 **4. Time of Designation.** Unless otherwise agreed, the designation of any
7 material as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” shall be made
8 at the following times:

9 (a) For documents, at the time of the production of documents;
10 (b) For declarations, affidavits, written discovery responses, and
11 pleadings, at the time of the service or filing, whichever occurs first; and
12 (c) For testimony, either (i) at the time that such testimony is given, or (ii)
13 within thirty (30) days after the receipt of the transcript of such testimony by the
14 Designating Party; and

15 (d) For documents received from a third-party in response to a subpoena,
16 within thirty (30) days after the receipt of such documents by the Designating
17 Party.

18 **5. Resolution of Disputes Regarding Designation.** If a party receiving
19 Protected Material (the “Receiving Party”) believes that any information is
20 improperly designated, as provided in this Order, it may, at any time, contest such
21 designation by sending written notice to the Designating Party. Receiving Party
22 does not waive its right to challenge a confidentiality designation by electing not to
23 mount a challenge promptly after the original designation is disclosed. The parties
24 shall attempt to resolve each challenge in good faith and must confer directly (in
25 voice to voice dialogue; relying solely on other forms of communication is not
26 sufficient) within 14 days of the date of notice. In conferring, the challenging party
27 must explain the basis for its belief that the confidentiality designation was not
28 proper and must give the Designating Party an opportunity to review the

1 designated material, to reconsider the circumstances, and, if no change in
2 designation is offered, to explain the basis for the chosen designation. If the parties
3 cannot in good faith resolve the dispute, the parties will submit a joint letter brief
4 that addresses their positions on removing or changing the designation; provided,
5 however, that the Designating Party shall have the burden of proving that such
6 particular Protected Material is properly designated. Protected Material that is
7 subject to a dispute shall be treated as originally designated until the parties agree
8 or the Court orders otherwise. In addition, the parties may submit a joint letter brief
9 addressing their respective positions on a confidentiality designation at any time if
10 there is good cause for doing so, including a challenge to the designation of a
11 deposition transcript or any portions thereof. Any joint letter brief brought pursuant
12 to this provision must be accompanied by a competent declaration affirming that
13 the parties have complied with the meet and confer requirements imposed.

14 **6. Persons to Whom Protected Material May Be Disclosed.**

15 **(a) Disclosure of “CONFIDENTIAL” Material.** Material designated as
16 “CONFIDENTIAL” may be disclosed, and copies may be provided, only to the
17 following:

18 i. The parties to this action;

19 ii. The parties’ outside counsel of record and such counsel’s
20 support staff, legal assistants, and clerical personnel (collectively, “Outside
21 Counsel”);

22 iii. Any expert witness or consultant (collectively, “Expert”)
23 retained by a party or its respective attorneys in connection with this action, but
24 only after such person has been provided with a copy of this Order and has
25 acknowledged his or her willingness to abide by the Order by executing the
26 attached Confidentiality Agreement;

27 iv. Any witness who may testify at a deposition or trial in this
28 action with respect to Confidential Material, but only after such person has been

1 provided with a copy of this Order and has acknowledged his or her willingness to
2 abide by the Order by executing the attached Confidentiality Agreement;

3 v. Any non-party support services including, but not limited to,
4 outside copying services, court reporting services, court reporters, and
5 videographers as may be reasonably necessary in connection with the preparation
6 or conduct of this action; and

7 vi. The Court and its personnel and any mediator or arbitrator
8 having jurisdiction over this action.

9 vii. the author or recipient of a document containing the
10 information or a custodian or other person who otherwise possessed or knew the
11 information.

12 (b) **Disclosure of “ATTORNEYS’ EYES ONLY” Material.** Material
13 designated as “ATTORNEYS’ EYES ONLY” may be disclosed, and copies may
14 be provided, only to the following:

15 i. The parties’ outside counsel of record and such counsel’s
16 support staff, legal assistants, and clerical personnel (collectively, “Outside
17 Counsel”);

18 ii. Any expert witness or consultant (collectively, “Expert”)
19 retained by a party or its respective attorneys in connection with this action;

20 iii. Any non-party support services including, but not limited to,
21 outside copying services, court reporting services, court reporters, and
22 videographers as may be reasonably necessary in connection with the preparation
23 or conduct of this action; and

24 iv. The Court and its personnel and any mediator or arbitrator
25 having jurisdiction over this action.

26 v. the author or recipient of a document containing the
27 information or a custodian or other person who otherwise possessed or knew the
28 information.

(c) Additional Authorized Disclosure of Protected Materials.

Notwithstanding anything to the contrary in ¶¶ 6(a) or 6(b) of this Order, particular Protected Materials that have been designated as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” may be disclosed and copies may be provided:

i. To any other persons with the prior written consent of the Designating Party; and

ii. To any other persons with the prior authorization of the Court.

7. Disclosure and Use of Protected Material. The Receiving Party shall not disclose Protected Material except in accordance with this Order, nor use Protected Material for any purpose other than preparing for and conducting the prosecution and defense of the claims between or involving the parties to this proceeding and any review or appellate proceedings that may follow. Disclosure of any Protected Material shall be limited to disclosure reasonably necessary for the prosecution and defense of claims in this proceeding.

8. No Limitation on Ability to Advise Clients. Nothing in this Order shall bar or otherwise restrict any attorney from rendering advice to his or her client with respect to this litigation and, in the course thereof, referring to or relying generally upon his or her examination of documents or information designated as Protected Material; provided, however, that in rendering such advice and in otherwise communicating with his or her clients, the attorney shall not disclose the content or the source of such information or documents contrary to the terms of this Order.

9. Filings with This Court. To the extent that Protected Material is sought to be filed with this Court, each such document and thing sought to be filed under seal shall follow the requirements and procedures of Local Rule 79-5.

10. Duty to Return Documents and Things. Within sixty (60) days after the entry of a final non-appealable judgment or order concluding the above-captioned action or the complete settlement of all claims asserted against all parties in this

1 action, each party shall, at its option, either return to the Designating Party or
2 destroy all Protected Material received from the Designating Party, and shall
3 destroy in whatever form stored or reproduced all work product and any other
4 documents or tangible things that contain or refer to Protected Material. Outside
5 Counsel for any party or non-party properly receiving Protected Material shall
6 provide written certification of compliance with this provision to counsel for the
7 Designating Party within ninety (90) days after the entry of a final non-appealable
8 judgment or order concluding this action or the complete settlement of all claims
9 asserted against all parties to this action. Counsel of record may retain one set of
10 all papers filed with the Court, including any Protected Material filed under seal
11 and need not destroy any work product containing any Protected Material.
12 Protected Material used as exhibits in hearings or other aspects of this matter may
13 be resealed at the request of either party.

14 **11. Inadvertent Disclosure of Protected Material.** Inadvertent failure to
15 identify documents or items as “CONFIDENTIAL” or “ATTORNEYS’ EYES
16 ONLY” information pursuant to the terms of this Order shall not constitute a
17 waiver of any otherwise valid claim for protection, so long as such claim is
18 asserted within thirty (30) days of the discovery of the inadvertent disclosure. At
19 such time, arrangements shall be made for the Designating Party to appropriately
20 mark the information in accordance with the terms of this Order. The Receiving
21 Party shall have no liability, under this Order or otherwise, for any disclosure of
22 information contained in documents or items not bearing a confidentiality legend
23 occurring before the Receiving Party was placed on notice of the Designating
24 Party’s claims of confidentiality.

25 **12. Inadvertent Disclosure of Work Product or Privileged Information.**
26 When a Producing Party gives notice to Receiving Parties that certain inadvertently
27 produced material is subject to a claim of privilege or other protection, the
28 obligations of the Receiving Parties are those set forth in Federal Rule of Civil

1 Procedure 26(b)(5)(B). If, after conferring, the parties are unable to reach a
2 satisfactory agreement, the Producing Party may file a motion regarding the matter,
3 but must do so within ten (10) business days after conferring with the Receiving
4 Party. The Receiving Party shall not disclose to any person the document or thing
5 for which the belated claim of immunity or privilege is being made, other than
6 those persons who have had it in their possession prior to receipt of notification
7 from the Producing Party, until ten (10) business days after receipt of the
8 notification or, if a motion seeking the return of the inadvertently disclosed
9 documents or information is filed with the Court, until the disposition of any such
10 motion.

11 **13. Subpoena of “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY”**
12 **Information.** If any individual or entity subpoenas, orders production, or requests
13 discovery of Protected Material that a Receiving Party has obtained subject to this
14 Order, the Receiving Party shall promptly notify the Designating Party of same and
15 shall not produce the Protected Material until the Designating Party has had
16 reasonable time (at least ten (10) business days) to object or take other appropriate
17 steps. If the Designating Party timely seeks a protective order, the Party served
18 with the subpoena or court order shall not produce any information designated in
19 this action as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” before a
20 determination by the court from which the subpoena or order issued, unless the
21 Party has obtained the Designating Party’s permission. The Designating Party shall
22 bear the burden and expense of seeking protection in that court of its confidential
23 material – and nothing in these provisions should be construed as authorizing or
24 encouraging a Receiving Party in this action to disobey a lawful directive from
25 another court.

26 **14. Duty to Report.** When any attorney of record in this action becomes aware
27 of any disclosure of Protected Material to any person or in any circumstance not
28 authorized under this Protective Order, such attorney shall promptly report any

1 such violation to Outside Counsel for the Designating Party, use its best efforts to
2 retrieve all unauthorized copies of the Protected Material, inform the person or
3 persons to whom unauthorized disclosures were made of all the terms of this
4 Protective Order, and request such person or persons to execute the attached
5 Exhibit A attached hereto.

6 **15. Continuing Jurisdiction.** After the conclusion of the above-captioned
7 action, the provisions of this Order shall continue to be binding until further order
8 of this Court, and this Court shall retain jurisdiction over the parties and any other
9 person who has had access to Protected Material pursuant to this Order, in order to
10 enforce the provisions of this Order.

11 **16. Limitations of Order.** The restrictions set forth in any of the preceding
12 paragraphs shall not apply to material that:

13 (a) was, is, or becomes public in a manner other than by violation of this
14 Order;

15 (b) was already lawfully possessed by the non-designating party before
16 the disclosure by the Designating Party (except for documents or items in the
17 possession of the non-designating party that are subject to a confidentiality or non-
18 disclosure agreement); or

19 (c) was independently developed by the non-designating party by
20 personnel who did not receive or have access to the Designating Party's Protected
21 Material.

22 **17. Modification or Amendment of Order.** This Order is without prejudice to
23 the right of any party to seek modification or amendment of this Order by further
24 Order of this Court upon motion and notice.

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26 IT IS SO ORDERED.
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28 DATED this 22nd day of January, 2019.

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T. Hixson

U.S. Magistrate Judge Thomas S. Hixson

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